88-1390

No._____

Supreme Court, U.S.
FILED
FEB 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1988

SAMUEL R. LOWERY, M.D.,

Petitioner,

vs.

CATHERINE JUNE LOWERY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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QUESTION PRESENTED

WHETHER THE REFUSAL OF THE HIGHEST COURT IN A STATE TO TRULY CONSIDER AN APPEAL WHICH INVOLVES A SUBSTANTIAL FEDERAL CONSTITUTIONAL QUESTION IS A VIOLATION OF THE SUPREMACY CLAUSE OF THE CONSTITUTION OF THE UNITED STATES AND A VIOLATION OF THE DUE PROCESS RIGHTS OF THE LITIGANT AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

PARTIES TO PROCEEDING

The parties to this proceeding are those indicated in the caption of this petition for a writ of certiorari, Samuel R. Lowery, M.D. and Catherine June Lowery.

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No._____

In The
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SAMUEL R. LOWERY, M.D.,

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vs.

CATHERINE JUNE LOWERY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The petitioner, Samuel R. Lowery, M.D., prays that a writ of certiorari issue to review the judgment entry of the Supreme Court of Ohio entered in this proceeding on 12 October 1988.

JUDGMENTS BELOW

The opinion of the Court of Appeals of Ohio, Sixth Judicial District, is unreported. [See Appendix A attached, p. 11, infra].

The judgment entries of the Supreme Court of Ohio are unreported, and appear in Appendix C and D, p. 20 and 22, infra.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on 12 October 1988. The judgment of the Supreme Court of Ohio denying rehearing was entered on 23 November 1988.

This petition for a writ of certiorari was filed within 90 days of the latter date. The Court's jurisdiction is invoked under 28 U.S.C., Section 1257 (a).

CONSTITUTIONAL PROVISIONS

ARTICLE VI, UNITED STATES CONSTITUTION:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, . . .

FOURTEENTH AMENDMENT,
UNITED STATES CONSTITUTION:

. . . No State shall . . . deprive any person of . . . property, without due process of law; . . .

STATEMENT OF THE CASE

This case began in the Domestic Relations Division of the Court of Common Pleas of Sandusky County, Ohio, where the petitioner had filed for divorce from the respondent on 3 February 1986.

No written Separation Agreement or Proposed Judgment Entry was ever approved, in writing or otherwise, by either the petitioner or his counsel. Nevertheless, in the midst of an exchange of various proposed final divorce decree entries by the parties' attorneys, the respondent filed a proposed "Judgment Entry - Decree of Divorce," attached to a "Request for Approval of the Agreement of the Parties." This proposed entry was an exact duplicate of a written separation agreement

which was proposed by the respondent, but never agreed to or signed by the petitioner. Also attached to the "Request" was a copy of a transcript apparently made from the tape recording of a hearing held before the court on 30 March 1987. The transcript contained no certification by a court reporter or other court officer. On its face, it is clear that the written proposed "Judgment Entry - Decree of Divorce" is broader in scope than what is contained in the transcript, and that much of what is contained in the written document concerning the division of marital property and payment of child support is absent from the transcript.

Nevertheless, the court, without a hearing, entered judgment on 28 August 1987. The court granted the "(Request) Motion for Approval of the Agreement of the Parties," filed by the respondent, and denied a motion of the petitioner to set aside the separation agreement. The court stated that it had ruled "[a]fter due consideration of the Memoranda submitted by counsel, a review of the proposed Judgment Entry submitted by counsel for the defendant [respondent], a review of the transcript of the proceedings on March 30, 1987, and the Court's independent recollection of the proceedings on March 30, 1987."

The plaintiff appealed the 28 August 1987 Judgment Entry of the court to the Court of Appeals of Ohio for the Sixth Judicial District. On 10 June 1988, the Court of Appeals affirmed the judgment of the trial court. From that Decision and Journal Entry of the Court of Appeals, an appeal was taken to the Supreme Court of Ohio.

The Supreme Court of Ohio granted the motion of the petitioner to file an Amended Notice of Appeal, alleging that the

appeal involved a substantial question arising under the Constitution of the United States. On 12 October 1988, the Supreme Court of Ohio overruled the motion of the petitioner for an order of the Supreme Court of Ohio directing the Court of Appeals for Sandusky County to certify its record, making no mention of the federal constitutional question.

The petitioner timely filed a motion for reconsideration of the Judgment Entry, pointing out that the constitutional question had not been addressed by the Supreme Court of Ohio. On 23 November 1988, the Supreme Court of Ohio denied rehearing of its judgment entry of 12 October 1988. It is from that denial that this petition is taken.

REASON FOR GRANTING THE WRIT

The decision below raises important and substantial questions concerning the obligation of state courts, pursuant to the supremacy clause of the United States Constitution, to entertain suits and to seriously consider appeals which allegedly involve violations of the federal constitutional rights of litigants.

Article VI of the Constitution of the United States is known as the "supremacy clause." It contains the following language relevant to this petition:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, . . .

Suits and appeals which involve alleged violations of federal constitutional rights are properly brought in state courts. If this were not the case, the federal court system would be even more burdened than at present with such cases.

Although this case was brought to the state appellate court on a contract theory of law, concerning the issue of whether a valid settlement was entered into by the litigants, the issue on appeal to the Supreme Court of Ohio involved the violation of the petitioner's right to due process of law under the Fourteenth Amendment to the Constitution of the United States. The facts upon which that issue was based were comprised of the disparity between what was heard by the court and what was adopted from a written document, unsigned by the petitioner, as the judgment of that court.

The Supreme Court of Ohio's responsibilities in safeguarding the federal and state constitutional rights of litigants are enunciated in Article IV, Section 2, of the Ohio Constitution:

> (B) (2) The supreme court *shall have appellate jurisdiction* as follows:
>
> (a) In *appeals* from the courts of appeals *as a matter of right in the following:*
>
> (iii) *Cases involving questions arising under the constitution of the United States* or of this state.
>
> [Italics supplied.]

The Supreme Court of Ohio is not free, therefore, to select cases for review on an arbitrary basis. Where a failure by a court of appeals within its supervisory jurisdiction to safeguard the federal and state constitutional rights of a litigant to due process of law is brought before the Supreme Court of Ohio, it must exercise its appellate jurisdiction to rectify the constitutional deprivation. It is the federal constitutional right alone which is at issue in this petition.

The Fourteenth Amendment to the Constitution of the United States, Section I, provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The petitioner has a federal constitutional right not to be deprived of his property except through due process of law. As has been explained, he also has a right to bring an alleged violation of that right to the Supreme Court of Ohio. It is a further violation of his federal constitutional right to due process of law for him to suffer having the courthouse door closed in his face. Yet that is precisely what has happened to the petitioner.

When the petitioner turned to the Supreme Court of Ohio to vindicate his federal constitutional right to due process of law, by reversing the decision of the Sixth District Court of

Appeals, that court turned its back on its responsibilities under both the supremacy clause of the Constitution of the United States and the Ohio Constitution, and refused to review the case, even though the case was brought to the court as of right.

It is important to note that the right to an appeal itself has been determined by the Supreme Court of Ohio to be a property interest, of which a litigant may not be deprived without due process of law. In *Atkinson v. Grumman Ohio Corp.*, 37 Ohio St. 3d 80 (1988), in the first paragraph of the syllabus, the court holds that:

> The right to file an appeal, as it is defined in the Appellate Rules, is a property interest and a litigant may not be deprived of that interest without due process of law.

The *Rules of Practice for the Supreme Court of Ohio*, Rule II, Section 3(B), provide as follows:

> (B) Where appellant claims that he has an appeal as of right (ie., that the case involves a constitutional question), the Supreme Court will, *sua sponte*, consider the case as on a motion to dismiss the appeal as one not involving any substantial constitutional question and will consider such motion to dismiss at the same time that it considers any motion to certify or motion for leave to appeal in the case.

Thus, the Supreme Court of Ohio, relying on this rule, sees itself as having "considered" a federal constitutional question

brought before it on appeal, simply by pronouncing that no substantial constitutional question is involved. It need provide, according to this rule, no basis in law for its determination. In this case, of course, the Supreme Court of Ohio did not even make that determination. It simply overruled the motion to certify. When the lack of a determination of the federal constitutional question was brought before the court in a motion for reconsideration, rehearing was simply denied.

The writ should be granted in this case to prevent a state court, here the Supreme Court of Ohio, from being able to "consider" a federal constitutional question brought before it by simply pronouncing it nonexistent or insubstantial, without citing any basis in law for that pronouncement.

In *Felder v. Casey,* ___ U.S. ___, 108 S. Ct. 2302 (1988), Mr. Justice Brennan, writing for the majority, rejected state policies that burden the prosecution of federal claims in state courts. He quoted from the decision in *Davis v. Wechsler,* 263 U.S. 22, 24 (1923), in which Mr. Justice Oliver Wendell Holmes observed that "[t]he state courts may deal with what they think proper in local matters but they cannot treat it as defeating a plain assertion of federal right."

Though Felder dealt with a federally-created cause of action, and this case deals with a federally-protected constitutional right, the rationale applies. The obligation of state courts to protect federally-protected rights is a serious one which cannot be disregarded arbitrarily in the name of local practice.

Nor should the Supreme Court of Ohio be heard to say that it would not have decided in favor of the petitioner even if it had truly considered his alleged federal constitutional violation. In *Peralta v. Heights Medical Center,* ___U.S. ___, 108

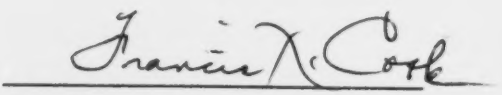
S. Ct. 896 (1988), Mr. Justice White, writing for a unanimous court of eight justices, does away with such reasoning:

> Where a person has been deprived of property in a manner contrary to the most basic tenets of due process, "it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." *Coe v. Armour Fertilizer Works,* 237 U.S. 413, 424, 35 S. Ct. 625, 629, 59 L. Ed. 1027 (1915). As we observed in *Armstrong v. Manzo, supra,* 380 U.S. (545), at 552, 85 S. Ct., at 1191, only "wip[ing] the slate clean . . . would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place." The Due Process Clause demands no less in this case.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Ohio.

Respectfully submitted,



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APPENDIX A.

C.A. NO. S-87-49

COURT OF APPEALS OF OHIO, SIXTH DISTRICT
COUNTY OF SANDUSKY

Samuel R. Lowery, M.D.

APPELLANT

- VS -

Catherine June Lowery

APPELLEE

APPEAL FROM
SANDUSKY COUNTY COMMON PLEAS COURT
NO. 86 DR 87

DECISION AND JOURNAL ENTRY

DATE June 10, 1988

This [case] is before the court on appeal from a judgment of the Sandusky County Court of Common Pleas wherein that court granted a decree of divorce. Plaintiff-appellant Samuel R. Lowery, M.D., timely appealed asserting the following assignments of error:

> "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S MOTION TO SET ASIDE THE SEPARATION AGREEMENT WHEN SAID PURPORTED AGREEMENT WAS INVALID.
>
> "II. THE TRIAL COURT ERRED IN ADOPTING DEFENDANT'S PROPOSED JUDGMENT ENTRY AS ITS FINAL DIVORCE DECREE WHEN SAID JUDGMENT WAS CONTRARY TO LAW, CONTRARY TO THE TERMS OF THE AGREEMENT AND GROSSLY UNEQUITABLE."

On February 6, 1986, appellant filed a complaint for divorce in the Sandusky County Court of Common Pleas. Defendant-appellee Catherine June Lowery filed an answer and counterclaim for divorce on February 18, 1986. Appellant responded to the counterclaim on February 28, 1986. On October 8, 1986, appellant filed a notice of dismissal, without prejudice, of his case. Appellee's counterclaim for divorce, however, remained pending. The case proceeded and in October 1986 a final hearing was scheduled for March 30, 1987.

On March 30, 1987, at 9:00 a.m., the parties and their attorneys indicated to the court a desire to try to reach a

property settlement agreement. Negotiations proceeded until approximately 5:50 p.m., at which time the parties with counsel entered the courtroom and reported to the court that a resolution had been reached on all matters. The agreement was then recited into the record including a provision that appellant would pay $500 per week child support for the two minor children, such amount to continue and not be reduced until the youngest child, then fourteen years, was emancipated or graduated from high school, a provision that college expenses for the children would be divided equally and a provision that appellant would dismiss, with prejudice, a suit by him against appellee for embezzlement from his medical practice. The parties were then specifically asked whether they agreed to this settlement. Both answered in the affirmative. Subsequently, a journal entry decree of divorce was prepared by counsel for appellee and forwarded to appellant's then counsel who responded that the proposed journal entry accurately reflected the intent of the parties. Appellant thereafter obtained new counsel who indicated an unwillingness to approve the agreement of the parties. Appellee's counsel filed a Request for Approval of the Agreement of the Parties in court on July 6, 1987. At a status conference on July 10, 1987, a hearing was held at which time testimony regarding venue, jurisdiction and grounds for divorce was taken. On July 20, 1987, appellant's new counsel filed a motion to set aside the agreement and schedule the matter for a contested hearing. The court denied appellant's motion and entered the journal entry decree of divorce.

Appellant contends that he did not realize that the court proceedings were a final hearing and that the agreement entered

into was final and binding. However, the court in the transcript of proceedings initially stated:

> "THE COURT: This is Case No. 86DR87, Samuel R. Lowery vs. Catherine June Lowery. The parties are present in court with their respective counsel, Mr. Crowther and Mr. Zinkand.
>
> "This case was assigned for a final hearing this morning to commence at nine o'clock. It is now approximately ten minutes until six, late afternoon, the parties have diligently discussed the issues in this case all day and have reported to the Court that a resolution has been reached on all matters.
>
> "At this point, I'm going to ask one or the other of the attorneys to please recite into the record the agreement, and then I'll be inquiring of the individual parties if that agreement is indeed satisfactory." (Emphasis added.)

The hearing had been scheduled for approximately five months. When asked by the judge, appellant responded affirmatively that the property settlement recited into the record did sound like what he agreed to. This was an express indication of his acceptance of the agreement. Thus, such agreement was not invalid and the court did not err in refusing to set the agreement aside.

Accordingly, appellant's first assignment of error is found not well-taken.

In his second assignment of error, appellant asserts that the judgment was contrary to law, contrary to the terms of the agreement and grossly inequitable.

As previously stated, testimony regarding venue, jurisdiction and grounds for divorce was taken at a status conference hearing on July 10, 1987, subsequent to the property settlement hearing. Thus, such necessary testimony was elicited and a decree of divorce could be granted.

Furthermore, although appellant cites Civ. R. 75(A), 3(A) and 41(A), and Sheldon's Lessee v. Newton (1854), 3 Ohio St. 494 and Spoors v. Coen (1886), 44 Ohio St. 497 for the proposition that a court cannot enter judgment without a complaint before it, and points out that he dismissed his action without prejudice pursuant to Civ. R. 41(A), appellant overlooks the fact that appellee counterclaimed for divorce, which action could and did remain pending for independent adjudication.

Appellant further asserts that the parties do not have authority to enter into an agreement to divest the court of its jurisdiction and that by the following statement the court was divested of jurisdiction:

> "*** In view of the assets, income and earning ability of Samuel R. Lowery, M.D. and the agreement of the parties, this allowance for support shall not be reduced by the court due to change of circumstances and shall not be reduced when the oldest child of the parties is emancipated or graduates from high school. ***"

Such entry did not divest the court of jurisdiction. Such entry merely indicates an intention on the part of the court to decline to exercise jurisdiction to modify the child support in light of the whole agreement of the parties, in which, inter alia, appellee agreed to forego any award of sustenance alimony, to which she was clearly entitled, on the condition that the child support award would not be reduced for approximately four years. Such clearly was an equitable entry.

Accordingly, appellant's second assignment of error is found not well-taken.

On consideration whereof, this court finds substantial justice was done the party complaining, and the judgment of the Sandusky County Court of Common Pleas is affirmed. Pursuant to App. R. 24, it is ordered that appellant pay the court costs of this appeal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp. R. 4, amended 1/1/80.

John J. Connors, Jr., J.
Peter M. Handwork, J.
George M. Glasser, J.
CONCUR

APPENDIX B.

COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT -
SANDUSKY COUNTY

CASE NO. S-8749

SAMUEL R. LOWERY, M.D.,

Plaintiff-Appellant,

- vs -

CATHERINE JUNE LOWERY,

Defendant-Appellee.

AMENDED NOTICE OF APPEAL

(Filed August 9, 1988)

Notice is hereby given that plaintiff-appellant, Samuel R. Lowery, M.D., hereby appeals to the Supreme Court of Ohio from the Judgment entered in this action by the Court of Appeals for the Sixth District of Ohio on the 10th day of June, 1988, affirming the Judgment of the Court of Common Pleas of Sandusky County, Ohio, in favor of defendant-appellee.

The case presents a questions of public or great general interest, and also involves a substantial question arising under the Constitution of the United States and of the State of Ohio.

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CERTIFICATE OF SERVICE AND OF FILING WITH COURT OF APPEALS

I hereby certify that a true copy of the within AMENDED NOTICE OF APPEAL was mailed by ordinary U.S. Mail, First Class, to John L. Zinkand, Esq., Potter Village Shopping Center, 2042 West State Street, Fremont, Ohio 43420, counsel for defendant-appellee, and that the original of said document was sent for filing to the Clerk of the Sandusky County Court of Appeals, Sandusky County Courthouse, Fremont, Ohio 43420, this 6th day of August, 1988.

Francis X. Cook
FRANCIS X. COOK CO., L.P.A.

APPENDIX C.

The Supreme Court of Ohio

Columbus

1988 TERM

To wit: October 12, 1988

Case No. 88-1429

Samuel R. Lowery, M.D.,
Appellant,

v.

Catherine June Lowery,
Appellee.

ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Sandusky County to certify its record, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Francis X. Cook.

THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 12th day of October, 1988.

MARCIA J. MENGEL CLERK

(Rita A. Jackson) DEPUTY

APPENDIX D.

The Supreme Court of Ohio

Columbus

1988 TERM

To wit: November 23, 1988

Case No. 88-1429

Samuel R. Lowery, M.D., Appellant,

v.

Catherine June Lowery, Appellee.

REHEARING ENTRY

(Sandusky County)

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby denied.

THOMAS J. MOYER
Chief Justice